

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE

Assigned on Briefs July 30, 3008

**DAMIEN M. JACKSON v. DAVID MILLS, WARDEN**

**Direct Appeal from the Criminal Court for Morgan County  
No. 9354 E. Eugene Eblen, Judge**

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**No. E2008-00278-CCA-R3-HC - Filed January 26, 2009**

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The petitioner, Damien M. Jackson, appeals from the Morgan County Criminal Court's summary dismissal of his petition for habeas corpus relief. The State argues summary dismissal was proper because the petition failed to comply with the procedural requirements for habeas relief and failed to state a cognizable claim for relief. Upon our review of the petition and the applicable authorities, we agree with the State and affirm the judgment of the trial court.

**Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Criminal Court Affirmed**

CAMILLE R. McMULLEN, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and JERRY L. SMITH, J., joined.

Damien M. Jackson, Wartburg, Tennessee, Pro Se.

Robert E. Cooper, Jr., Attorney General and Reporter; Rachel West Harmon, Assistant Attorney General, for the appellee, State of Tennessee.

**OPINION**

The petitioner was charged with first degree murder and two counts of attempted first degree murder. A jury convicted him of the lesser included offenses of second degree murder and two counts of attempted second degree murder. He was sentenced as a Range I, standard offender to twenty-five years for the murder conviction and twelve years for each of the attempted murder convictions, to be served consecutively, for an effective sentence of forty-nine years. A panel of this court affirmed the petitioner's convictions and sentence in State of Tennessee v. Damien Jackson, No. M2000-00763-CCA-R3-CD, 2001 WL 812254, at \*13 (Tenn. Crim. App., at Nashville, July 18, 2001), perm. to appeal denied (Tenn. Dec. 10, 2001). The petitioner was denied post-conviction relief, which on appeal was affirmed by this court in Damien M. Jackson v. State of Tennessee, No. M2003-00952-CCA-R3-PC, 2004 WL 1434494, at \*4 (Tenn. Crim. App., at Nashville, June 25, 2004), perm. to appeal denied (Tenn. Nov. 29, 2004).

On August 7, 2007, the petitioner filed a pro se petition for a writ of habeas corpus relief in the Morgan County Criminal Court. The petitioner alleged that the trial court violated double

jeopardy principles when it allowed the State to present alternative theories of first and second degree murder within the same indictment for the death of the same victim. He additionally argued that the trial court failed to instruct the jury on any lesser included offenses. The State filed a motion to dismiss, arguing that the petitioner had not complied with the requisite procedure and that the petitioner had failed to state a cognizable claim for relief, which was granted by the trial court. The petitioner then filed a motion to alter or amend the judgment, alleging the same grounds as stated in his petition for a writ of habeas corpus relief, which was denied by the trial court. A notice of appeal was later filed by the petitioner to this court.

“The determination of whether habeas corpus relief should be granted is a question of law.” See Mathis T. Vaughn v. James Worthington, Warden, No. E2007-00808-CCA-R3-HC, 2008 WL 58956, at \*1 (Tenn. Crim. App., at Knoxville, Jan. 4, 2008) (quoting Faulkner v. State, 226 S.W.3d 358, 361 (Tenn. 2007), no perm. to appeal filed). Therefore, our review of the habeas corpus court’s decision is “de novo with no presumption of correctness afforded to the [habeas corpus] court.” Id. (quoting Faulkner, 226 S.W.3d at 361).

A prisoner is guaranteed the right to habeas corpus relief under Article I, section 15 of the Tennessee Constitution. See also T. C. A. § 29-21-101 to -130. However, the grounds upon which a writ of habeas corpus may be issued are very narrow. Taylor v. State, 995 S.W.2d 78, 83 (Tenn. 1999). “Habeas corpus relief is available in Tennessee only when ‘it appears upon the face of the judgment or the record of the proceedings upon which the judgment is rendered’ that a convicting court was without jurisdiction or authority to sentence a defendant, or that a defendant’s sentence of imprisonment or other restraint has expired.” Archer v. State, 851 S.W.2d 157, 164 (Tenn. 1993) (quoting State v. Galloway, 45 Tenn. (5 Cold.) 326, 337 (1868)). “[T]he purpose of a habeas corpus petition is to contest void and not merely voidable judgments.” Id. at 163 (quoting Potts v. State, 833 S.W.2d 60, 62 (Tenn. 1992)). “A void judgment is one in which the judgment is facially invalid because the court lacked jurisdiction or authority to render the judgment or because the defendant’s sentence has expired.” Taylor, 995 S.W.2d at 83. However, as the Tennessee Supreme Court stated in Hickman v. State:

[A] voidable judgment is facially valid and requires the introduction of proof beyond the face of the record or judgment to establish its invalidity. Thus, in all cases where a petitioner must introduce proof beyond the record to establish the invalidity of his conviction, then that conviction by definition is merely voidable, and a Tennessee Court cannot issue the writ of habeas corpus under such circumstances.

Hickman v. State, 153 S.W.3d 16, 24 (Tenn. 2004) (internal citations, quotations, and emphasis omitted); see also Summers v. State, 212 S.W.3d 251, 256 (Tenn. 2007) (citation omitted). Moreover, it is the petitioner’s burden to demonstrate, by a preponderance of the evidence, that the judgment is void or that the confinement is illegal. Wyatt v. State, 24 S.W.3d 319, 322 (Tenn. 2000).

If the habeas corpus court determines from the petitioner's filings that no cognizable claim has been stated and that he is not entitled to relief, the petition for writ of habeas corpus may be summarily dismissed. See Hickman v. State, 153 S.W.3d at 20. Further, the habeas corpus court may summarily dismiss the petition without the appointment of a lawyer and without an evidentiary hearing if there is nothing on the face of the judgment to indicate that the convictions are void. Passarella v. State, 891 S.W.2d 619, 627 (Tenn. Crim. App. 1994).

Additionally, the procedural requirements for habeas corpus relief are mandatory and must be scrupulously followed. Summers v. State, 212 S.W.3d 251, 259 (Tenn. 2007) (citations omitted). Tennessee Code Annotated section 29-21-107(a) provides that the petition for writ of habeas corpus must be signed and verified by affidavit. In addition, the statute requires that the petition state:

- (1) That the person in whose behalf the writ is sought, is illegally restrained of liberty, and the person by whom and place where restrained, mentioning the name of such person, if known, and, if unknown, describing the person with as much particularity as practicable;
- (2) The cause or pretense of such restraint according to the best information of the applicant, and if it be by virtue of any legal process, a copy thereof shall be annexed, or a satisfactory reason given for its absence;
- (3) That the legality of the restraint has not already been adjudged upon a prior proceeding of the same character, to the best of the applicant's knowledge and belief; and
- (4) That it is first application for the writ, or, if a previous application has been made, a copy of the petition and proceedings thereon shall be produced, or satisfactory reasons be given for the failure so to do.

T.C.A. § 29-21-107(b) (2006). A trial court properly may choose to summarily dismiss a petition for failing to comply with the statutory procedural requirements. Id.

On appeal, the petitioner argues that his sentence is void because (1) the trial court violated double jeopardy principles when it allowed the State to present alternative theories of first and second degree murder within the same indictment for the death of the same victim; (2) the trial court failed to instruct the jury on any lesser included offenses; (3) the habeas corpus court erred by dismissing his petition prior to the appointment of counsel; and (4) the habeas court erred by failing to determine whether the petitioner was indigent prior to dismissing the petition. The State argues summary dismissal was proper because (1) the petitioner failed to comply with the procedural requirements of habeas corpus relief, and (2) the petitioner fails to state a cognizable claim for relief. We agree with the State.

As an initial matter, the State correctly asserts that the petition for habeas corpus relief is unsworn and does not allege whether this claim has been previously litigated in any other actions.

Based on this alone, the habeas court's summary dismissal of the petition was proper. See Summers v. State, 212 S.W.3d 251, 260 (Tenn. 2007). Even if the petitioner had complied with the mandatory procedural requirements of habeas corpus relief, he fails to state a cognizable claim of relief.

In his first argument, the petitioner claims the State's presentment charging both first degree murder and felony murder of the same victim violates double jeopardy. The pertinent counts of the presentment provide:

**COUNT 1**

THE GRAND JURORS of Davidson County, Tennessee, duly impaneled and sworn, upon their oath, present that:

**DAMIEN MARCESS JACKSON,  
a.k.a. DAMIEN MAR'CESS JACKSON**

on the 30<sup>th</sup> day of April, 1998, in Davidson County, Tennessee and before the finding of this indictment intentionally, and with premeditation did kill Hershel King, in violation of Tennessee Code Annotated §39-13-202, and against the peace and dignity of the State of Tennessee.

**COUNT 2**

THE GRAND JURORS of Davidson County, Tennessee, duly impaneled and sworn, upon their oath, present that:

**DAMIEN MARCESS JACKSON,  
a.k.a. DAMIEN MAR'CESS JACKSON**

on the 30<sup>th</sup> day of April, 1998, in Davidson County, Tennessee and before the finding of this indictment, did kill Hershel King, during the perpetration of or attempt to perpetrate the first degree murder of a person to the Grand Jury unknown, in violation of Tennessee Code Annotated §39-13-202, and against the peace and dignity of the State of Tennessee.

The jury convicted the petitioner of second degree murder on both count one and count two. In order to impose only one sentence, the trial court properly merged count two into count one. This court has previously held that “[a]lternative theories of guilt within a single indictment are permissible.” See Robert Howell v. Tony Parker, Warden, No. W2005-00521-CCA-R3-HC, 2005 WL 1541825, at \*2, (Tenn. Crim. App., at Jackson, June 27, 2005) (citation omitted). Additionally, claims of double jeopardy are not cognizable claims for habeas corpus relief. Bobby James Mosley v. Wayne Brandon, Warden, No. M2006-02398-CCA-R3-HC, 2007 WL 1774309, at \* 5 (Tenn. Crim. App., at Nashville, June 20, 2007) perm. to appeal denied (Tenn. Sept. 17, 2007)(citing Ralph Phillip Claypole v. State, No. M1999- 02591-CCA-R3-PC, 2001 WL 523367, at \*2 (Tenn. Crim.

App., at Nashville, May 16, 2001)). Therefore, the petitioner's claim that his convictions are void is without merit.

Next, the petitioner claims that he was denied his right to a fair trial because the trial court failed to instruct the jury on lesser included offenses. Even if true, the petitioner would not be entitled to habeas corpus relief. "Although the failure to instruct on appropriate lesser included offenses is indeed an error of constitutional magnitude, omission of instructions on lesser included offenses renders the conviction voidable rather than void." See Mathis T. Vaughn v. James Worthington, Warden, No. E2007-00808-CCA-R3-HC, 2008 WL 58956, at \*2 (Tenn. Crim. App., at Knoxville, Jan. 4, 2008) (internal citations omitted), no perm. to appeal filed. Accordingly, the petitioner is not entitled to relief on this issue.

Finally, the petitioner argues that the habeas court erred when it dismissed his petition before determining whether he was indigent or appointing counsel. "There is no federal or state constitutional right to counsel in a habeas corpus proceeding." Summers v. State, 212 S.W.3d 251, 260 (Tenn. 2007)(citations omitted). However, Rule 13 of the Rules of the Tennessee Supreme Court provides that an indigent petitioner in a habeas corpus proceeding may have appointed counsel. Tenn. Sup. Ct. R. 13, § 1(d)(1)(C). "Appointment of counsel in a state habeas corpus proceeding is within the trial court's discretion." Summers, 212 S.W.3d at 260. Further, Tennessee Code Annotated section 40-14-204 states that in habeas corpus proceedings the trial court "shall determine the question of indigency and appoint counsel, if necessary, in the manner set out in this part." T.C.A. § 40-14-204 (2006). Here, because none of the petitioner's claims are cognizable claims for habeas corpus relief, the habeas court properly dismissed the petition without a determination of indigency or appointment of counsel. See Hickman v. State, 153 S.W.3d at 20

**Conclusion.** Upon review of the record and applicable law, this court concludes that the petitioner is not entitled to habeas corpus relief and that the habeas court's summary dismissal of the petition was proper.

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CAMILLE R. McMULLEN, Judge